

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

CR. NO. 2:02-246 WBS

Plaintiff,

ORDER

v.

OCTAVIO HERNANDEZ SUAREZ,

Defendant.

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On May 12, 2004, defendant Octavio Hernandez Suarez was convicted by jury verdict of Counts One and Five of the Indictment. (Docket Nos. 118-119.) Count One charged defendant with conspiracy to distribute methamphetamine in violation of 21 U.S.C. §§ 846 and 841(a)(1), and Count Five charged him with possession with intent to distribute methamphetamine, aiding and abetting, in violation of 21 U.S.C. § 841(a)(1). (Presentence Report ("PSR") ¶ 1.) Because defendant was found to have trafficked at least 50 grams of methamphetamine, (PSR ¶ 25), and

1 previously convicted of a felony drug offense, (PSR ¶¶ 34-35,
2 60),¹ section § 841(b)(1)(A) mandated a minimum sentence of
3 twenty years' imprisonment for each offense. See 21 U.S.C.
4 § 841(b)(1)(A)(viii) (2002) (amended 2006).²

5 At defendant's sentencing hearing on July 30, 2004, the
6 court adopted the PSR's recommendations and found that
7 defendant's total offense level was 28 and his criminal history
8 category was III. (Docket No. 127; PSR ¶ 60.) Although this
9 would ordinarily result in a guideline range of 97 to 121 months,
10 the court imposed the statutory minimum sentence of 240 months'
11 imprisonment on each of Counts One and Five, to be served
12 concurrently. (Docket No. 131; PSR ¶ 55); see U.S.S.G.
13 § 5G1.1(b) (2003) ("Where a statutorily required minimum sentence
14 is greater than the maximum of the applicable guideline range,
15 the statutorily required minimum sentence shall be the guideline
16 sentence.").

17 Defendant now moves to reduce his sentence pursuant to
18 U.S.C. § 3582(c)(2) based on Amendment 782 to the United
19 States Sentencing Guidelines ("U.S.S.G."). (Mot. (Docket No.
20 239).)³ Amendment 782 retroactively modifies the Drug Quantity
21 Table in § 2D1.1 and reduces by two points the base offense level
22

23 ¹ On June 11, 2003, the government filed an information
24 charging defendant with a prior felony drug conviction pursuant
to 21 U.S.C. § 851. (Docket No. 57.)

25 ² Section 841 was amended in 2006, 2009, and 2010. The
26 current version of the statute does not alter defendant's
mandatory minimum sentence. See id. § 841(b)(1)(A)(viii) (2010).

27 ³ Defendant initially filed his motion pro se. (Docket
28 No. 230.) The court subsequently appointed counsel to represent
defendant, (Docket No. 233), after which defendant filed this
motion amending the one he previously filed pro se.

1 for most federal drug offenses. See U.S.S.G. supp. to app. C,
2 amend. 782 (2014).

3 Section 3582(c)(2) provides that, when a defendant is
4 sentenced "based on a sentencing range that has subsequently been
5 lowered by the Sentencing Commission . . . the court may reduce
6 the term of imprisonment . . . if such a reduction is consistent
7 with applicable policy statements issued by the Sentencing
8 Commission." 18 U.S.C. § 3582(c)(2). To grant a motion under 18
9 U.S.C. § 3582(c)(2), the court must determine that a reduction is
10 consistent with the policy statement promulgated in § 1B1.10.
11 Dillon v. United States, 560 U.S. 817, 826-27 (2010). Section
12 1B1.10 provides that "a reduction in the defendant's term of
13 imprisonment is authorized under 18 U.S.C. § 3582(c)(2)" only if
14 "the guideline range applicable to that defendant has
15 subsequently been lowered as a result of an amendment to the
16 Guidelines Manual." U.S.S.G. § 1B1.10(a) (2003).⁴

17 Even if Amendment 782 had been in place at the time
18 defendant was sentenced, his applicable sentencing range would
19 have been the same. As initially calculated, defendant's base
20 offense level was 34 pursuant to the Drug Quantity Table in
21 § 2D1.1(c)(3). (PSR ¶ 25.) Because defendant received a
22 mitigating role adjustment under § 3B1.2, his maximum base
23 offense level was reduced to 30 pursuant to § 2D1.1(a)(3). (PSR
24 ¶ 26); § 2D1.1(a)(3) (2003) (providing that a defendant who
25 receives a mitigating role adjustment under § 3B1.2 shall not

26 4 "The court shall use the Guidelines Manual in effect on
27 the date that the defendant is sentenced." U.S.S.G. § 1B1.11(a)
28 (2015). The manual in effect on the date that defendant was
sentenced, July 30, 2004, was the 2003 Guidelines Manual.

1 have a base offense level of more than 30).

2 Defendant then received a two-level reduction pursuant
3 to § 3B1.2(b) for his role as a minor participant in the criminal
4 activity. (PSR ¶ 28); § 3B1.3 cmt. n.6 (2003) (providing that,
5 if a defendant's base offense level is "reduced by operation of
6 the maximum base offense level in § 2D1.1(a)(3), the court shall
7 also apply the appropriate [role] adjustment under" § 3B1.1).
8 The court thus found that defendant's total base offense level
9 was 28 and his criminal history category was III.

10 Defendant acknowledges that his total offense level
11 would not have changed even in light of Amendment 782. (Mot. at
12 3.) Pursuant to Amendment 782, defendant's base offense level
13 under the Drug Quantity Table would be reduced from 34 to 32.
14 This reduction is immaterial to defendant's guideline
15 calculation. Because the court would still reduce defendant's
16 maximum base offense level to 30 pursuant to § 2D1.1(a)(3) and
17 apply a two-level reduction pursuant to § 3B1(b), defendant's
18 total base offense level would remain at 28, even if Amendment
19 782 were in place at the time he was sentenced. See United
20 States v. Leniear, 574 F.3d 668, 673 (9th Cir. 2009) (holding
21 that the defendant's sentence was not "based on a sentencing
22 range that has subsequently been lowered by the Sentencing
23 Commission," as required by § 3582(c)(2) because his base offense
24 level would have been the same even if the guidelines amendment
25 had been in place at the time he was sentenced).

26 Amendment 782 would also not have affected the
27 imposition of the mandatory minimum sentence here. See U.S.S.G.
28 § 5G1.1(b) (2003) (requiring that the court apply the statutorily

1 required minimum sentence if it is greater than the maximum of
2 the applicable guideline range). "It is axiomatic that a
3 statutory minimum sentence is mandatory" and that "[a]
4 retroactive amendment to the Guidelines cannot reduce a sentence
5 below the statutory minimum term." United States v. Sykes, 658
6 F.3d 1140, 1146 (9th Cir. 2011); see also United States v.
7 Mullanix, 99 F.3d 323, 324 (9th Cir. 1996) (holding that "the
8 mandatory minimum was not affected by the change in the [drug]
9 equivalency tables" and, thus, "the district court had no
10 authority to reduce [the defendant's] sentence under
11 § 3582(c)(2)").

12 Defendant's sentence here was based on the mandatory
13 minimum sentence pursuant to 21 U.S.C. § 841(b)(1)(A)(viii) and
14 § 851(a)(1), and not "on a sentencing range that has subsequently
15 been lowered by the Sentencing Commission" pursuant to 18 U.S.C.
16 § 3582(c)(2). See United States v. Paulk, 569 F.3d 1094, 1095-96
17 (9th Cir. 2009) (per curiam) ("[Defendant] is not entitled to a
18 reduction because his sentence was not 'based on a sentencing
19 range that has subsequently been lowered by the Sentencing
20 Commission,' 18 U.S.C. § 3582(c)(2), but rather was based on the
21 statutory mandatory minimum under 21 U.S.C. § 841."). Defendant
22 also acknowledges that, even under Amendment 782, he still would
23 have received the mandatory minimum sentence under 21 U.S.C.
24 §§ 841 and 851. (Mot. at 3.) Accordingly, because defendant
25 does not qualify for a sentence reduction under 18 U.S.C.
26 § 3582(c)(2), the court must deny his motion.

27 IT IS THEREFORE ORDERED that defendant's amended motion
28 to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2),

1 (Docket No. 239), be, and the same hereby is, DENIED.

2 Dated: May 11, 2016



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4 **WILLIAM B. SHUBB**
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WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE